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**MAY 12 1999**

Ms. Cheryl Farson  
General Counsel  
Arizona Securities Division  
1300 West Washington Street, 3<sup>rd</sup> Floor  
Phoenix, Arizona 85007-2996  
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**Proposed Rule Changes to the Arizona Investment Management Act**

Dear Ms. Farson:

The Institute of Certified Financial Planners<sup>1</sup> (the "Institute" or "ICFP") appreciates the opportunity to provide comment on proposed changes to the above rules. The Institute is generally in support of these changes in the Arizona Investment Management Act (the "Act"), and has provided comment on specific sections where we believe the changes as proposed are warranted, or in some instances, require further amendment.

Our comments follow in the order of appearance in the proposal.

**R14--6-106. General dissemination of information on the Internet.**

The ICFP generally supports this provision, which adopts an approach by the states to industry web sites and related Internet communications. However, we have several comments on some of the proposed language, which departs from the NASAA model rule.

First, with respect to the new definition of "federal covered adviser" in the Definitions section of the Act, we believe such advisers also should be incorporated into this provision. This will help clarify that R114-6-106 applies

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<sup>1</sup> The Institute of Certified Financial Planners is a Denver-based professional association of 15,000 CFP licensees and candidates. ICFP includes approximately 200 practitioner members in the State of Arizona.

equally to state and federally registered investment advisers.

Secondly, in paragraphs A(1)(b) and A(4), the investment adviser and investment adviser representative ("IAR") are prohibited from effecting transactions unless compliant with or exempt from licensure or notice filing requirements. Technically speaking, an adviser cannot

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execute a securities transaction (as an adviser) under Article 4 of Chapter 13. Securities transactions are regulated under Article 4, Chapter 12 of Arizona Blue Sky Law. An adviser or IAR can only legally sell securities if licensed as a salesman of a broker-dealer under the aforementioned chapter. We would urge the Division to make these provisions clearly applicable only to investment advisers so that the advisory role, which carries a much higher fiduciary responsibility to the client, is not confused with the lesser suitability requirements of the broker-dealer salesman under Chapter 12. As such, the aforementioned paragraphs should reference only the rendering of investment advice for compensation, or individualized solicitation or negotiations for the sale of investment advisory services, and not securities transactions.

Further, with respect to the prohibition in paragraph A(4) against rendering advisory services through an Internet communication, we believe such a restriction should be conditioned upon the adviser or IAR being "compliant with or exempt from the licensure or notice filing requirements of the IM Act," by tracking similar language in paragraphs A(1) and A(3). We believe that investment advisers are increasingly relying upon the effecting of advisory services over the Internet, and correspondingly, also will want to rely on the *de minimis* exemption under Article 4 of Chapter 13 to permit such limited activity until the licensing threshold is met.

**R14--6-201. Books and records of investment advisers.**

The ICFP strongly supports the adoption of these amendments to make Arizona's books and records requirements consistent with the mandate under the National Securities Markets Improvement Act of 1996 with respect to Section 222(b) of the Investment Advisers Act of 1940. This latter provision prohibits states from enforcing any law or regulation that would require an investment adviser to maintain any books or records in addition to those required under the laws of the state in which the adviser maintains its principal place of business.

R14-6-204. Written examination.

The ICFP requests that the Division adopt a waiver from the NASAA Series 65 Uniform Investment Adviser State Law Examination for persons holding the CFP designation. As you may be aware, NASAA recently adopted a new minimum competency exam for IARs that will be "folded" into and replace the core testing modules of the existing Series 65 exam. NASAA is also recommending a waiver for the CFP designation from the new exam, based on objective comparisons between the two tests. We urge the Division to adopt the waiver consistent with NASAA's uniform recommendation to the states.

R14-6-206. Custody of client funds or securities by investment advisers.

The ICFP requests that a safe harbor for the forwarding of 3<sup>rd</sup>-party checks and stock certificates be added to the broadly defined definition of custody. With respect to checks made out to the client's custodian, the Securities and Exchange Commission, in a 1983 no-action letter, Lawwill Sena & Weller, Inc., deemed such checks would not be custody or possession of securities and funds. And in an April 2, 1991, no-action letter to Hayes Financial Services, SEC staff further  
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elaborated on the responsibility of the bank where the checking account was maintained. In such a case, the adviser "does not have custody or possession of client funds because the check is not considered 'funds' for purposes of the custody rule," the SEC staff said. "That check merely represents the client's promise to pay. Consequently, if a bank pays on a stolen check with a forged endorsement, the drawer (here, the client) is not liable to the payee."

With respect to securities, both the SEC custody rule and NASAA model rules provide for broker-dealers a safe harbor under Rule 15c3-1 of the Securities Exchange Act of 1934. Because it is the client that typically requests the investment adviser to forward stock certificates to the custodian, the ICFP urges the Division to provide similar relief under the Arizona Investment Management Act. We would recommend adapting the above rule to the state's custody rule by adding new paragraph (C) with something similar to the following language:

*"The provisions of this Section shall not apply to investment advisers with respect to physical possession or control of customers' third-party checks or securities if, solely as the result of normal business operations, temporary lags occur between the time when a third-party check or security is placed in the possession of the*

adviser by the client, and provided that the investment adviser takes timely steps in good faith to forward the check or security to the third-party custodian, which may be no later than the end of the next business day."

R14-6-210. Licensure of investment adviser representatives.

Under paragraph (B), we recommend updating the amounts referenced for an "Excepted person" consistent with recent rule changes made by the SEC to Rule 275.205-3(d)(1) that raised the amount of assets under management for a client to \$750,000; and the joint net worth of a married couple to \$1.5 million.

The ICFP would be pleased to discuss the foregoing comments in greater detail and to respond to any additional requests for information. Please feel free to contact the undersigned directly at 1.800.322.4237, ext. 129.

Sincerely,

Duane R. Thompson  
Director of Government Relations

cc: Greater Phoenix Society of the ICFP  
Tucson Society of the ICFP

**Farson, Cheryl**

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**From:** Duane Thompson [duaneicfp@worldnet.att.net]  
**Sent:** Tuesday, May 11, 1999 2:56 PM  
**To:** Cheryl Farson  
**Subject:** ICFP Comment Letter



AZruleComment90505.doc

Dear Cheryl,

This is a first by e-mail for me. Hard copy in the mail just in case. Please let me know if you have any questions with respect to our submission.

Sincerely,

Duane R. Thompson

ICFP Director of Government Relations